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EXAMINER
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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* ROBERT BENSON AYLOR  
and LEIGH HEATHER MAKOVER<sup>1</sup>

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Appeal 2016-004053  
Application 13/507,607  
Technology Center 1600

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Before MELANIE L. McCOLLUM, RICHARD J. SMITH, and  
RACHEL H. TOWNSEND, *Administrative Patent Judges*.

McCOLLUM, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a shampoo or skin conditioning product. The Examiner has rejected the claims as anticipated or obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

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<sup>1</sup> Appellants identify themselves as the real parties in interest (App. Br. 1).

STATEMENT OF THE CASE

Claims 1–4, 6, 8, and 21 are on appeal (App. Br. 1 & 10–11).<sup>2</sup>

Claims 1, 4, and 8 are representative and read as follows:

1. A shampoo or skin conditioning product free of ingredients that irritate the skin comprising an effective amount of mild vasodilator compound that can penetrate the skin for either: A) treating a migraine headache; or B) preventing loss of hair or aiding growth of hair; or C. minimizing wrinkles or improving skin appearance and health, said product being in a container in association with instructions either to apply the product to the head and/or neck to treat a migraine headache; or to apply the product to the head to inhibit loss of hair and promote hair growth; or to apply the product to wrinkled or rough skin to minimize the wrinkles and improve the appearance and health of the skin.

4. The product of Claim [1 wherein said compound is linalool] wherein the product is a shampoo, contains from about 1/2% to about 5% linalool and from about 1% to about 10% surfactant and is in a container in association with instructions to use the product as a shampoo to alleviate or prevent the harmful effects of a migraine headache.

8. The product of Claim [1 wherein said compound is linalool and the product is a skin conditioning product for direct application to the head including the back of the neck to treat migraine headaches] wherein the product contains from about one to about five percent linalool and less than about 10% surfactant.

Claims 1–3, 6, 8, and 21 stand rejected under 35 U.S.C. § 102(b) as anticipated by Hink et al. (US 4,933,371, June 12, 1990) (Ans. 2).

Claim 4 stands rejected under 35 U.S.C. § 103(a) as obvious over Hink (*id.* at 9).

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<sup>2</sup> Claims 5, 7, 9, 10, 12–15, and 17–20 are also pending but have been withdrawn from consideration (App. Br. 1).

### ANTICIPATION

The Examiner finds that “Hink teaches a method for controlling ticks and fleas with compositions comprising the elected mild vasodilator compound linalool” (Ans. 2). The Examiner also finds that “Hink teaches, in a preferred method, the linalool is applied to the coat of an animal, wherein the linalool is preferably applied as a shampoo, dip or spray” (*id.* at 3). In addition, the Examiner finds:

Hink teaches shampoo compositions containing either 1% linalool (Example II) or 5% linalool (Example IV) . . . . The amount of linalool taught by Hink in Examples II and IV are effective in controlling ticks and fleas and, further, as evidenced by the embodiment of instant Claims 8 and 21, are present in an amount effective to treat migraine headaches.

(*Id.*) The Examiner also finds that “Hink teaches the shampoo compositions are applied on the skin and hair of an animal in a conventional manner” (*id.*). In addition, the Examiner finds that, “because the linalool compositions of Hink contain ingredients in amounts suitable for application to the skin of an animal . . . , the compositions of Hink are considered to be free of ingredients that irritate the skin” (*id.* at 3–4).

The Examiner also finds that Hink “teaches ‘pump spray’ compositions, wherein said pump sprays are liquid compositions for use in a hand-held container” (*id.* at 4). On the other hand, the Examiner finds:

Hink does not explicitly teach the shampoo compositions are in a *container* as required by instant Claim 1. However, one of ordinary skill would consider it implicit, using the broadest reasonable interpretation of the term “container”, that Hink’s teaching of shampoo compositions (e.g. in Example’s II and IV) that are applied in a conventional manner and formed by combining a shampoo base containing 6 components (i.e. the shampoo base of Example I) and linalool and then applied to the

skin . . . and hair o[f] an animal, require the composition, prior [ ]to application, to be ‘contained’ and thus be present in a “container”; absent evidence to the contrary.

(*Id.* at 5.)

With regard to claim 8, the Examiner additionally finds that the “linalool pump spray composition[ ] of [Hink’s] Example IX comprises 5 percent linalool and 95 percent of a solution of water and SDA-40 by weight and do[es] not appear to contain a surfactant, thus meeting the limitation of amended instant Claim 8 (a composition containing less than [ ]10% surfactant)” (*id.* at 4).

#### *Analysis*

Upon review of the Final Rejection and Examiner’s Answer, we conclude that the Examiner has set forth a prima facie case, which is summarized above, that Hink anticipates claims 1 and 8.

Appellants argue: “The pump spray is not a shampoo. If the Hink et al spray could be used as a shampoo, it would have to contain surfactant which is not disclosed. Modification of the pump spray to obtain a shampoo would not result in an ‘anticipation’ of the present claims.” (App. Br. 5.) We are not persuaded.

We note initially that claim 1 recites a shampoo *or* skin conditioning product. Hink specifically discloses that a “pump spray is a liquid for use in a hand-held *container* for spraying directly onto the coat of an animal, and/or onto bedding, carpets and other environmental surfaces” (Hink, col. 5, ll. 53–56 (emphasis added)). Even if we agree with Appellants that the pump spray is not a shampoo, Appellants have not adequately explained why the pump spray would not be considered a skin conditioning product.

We acknowledge Appellants' argument "that killing ticks and fleas does not condition the skin" (Reply Br. 6). However, the Specification discloses the use of its product, which contains a mild vasodilator that can penetrate the skin, such as linalool, "for minimizing wrinkles, *improving the skin's condition*, and increasing hair growth and/or minimizing hair loss where the compounds/products are applied" (Spec. 2: 21–28 & 3: 17 (emphasis added)). Thus, whether or not killing ticks and fleas conditions the skin, the Specification supports the conclusion that Hink's composition, which comprises linalool (Hink, Abstract), conditions the skin.

Moreover, "in considering the disclosure of a reference, it is proper to take into account not only specific teachings of the reference but also the inferences which one skilled in the art would reasonably be expected to draw therefrom." *In re Preda*, 401 F.2d 825, 826 (CCPA 1968). In this case, we agree with the Examiner that "one of ordinary skill would consider it implicit, using the broadest reasonable interpretation of the term 'container', that Hink's teaching of shampoo compositions . . . require the composition, prior [ ]to application, to be 'contained' and thus be present in a 'container'" (Ans. 5). In particular, we conclude that Appellants have not demonstrated that the Specification requires that the "container" is one that can be closed, rather than any container within "the broader definition of . . . [an] object used to hold something" (Reply Br. 5).

Appellants also argue "that the instructions for dosage and benefits herein are functionally related to the product compositions" (App. Br. 2). We are not persuaded.

"Where the printed matter is not functionally related to the substrate, the printed matter will not distinguish the invention from the prior art in

terms of patentability.” *In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983). In *In re Ngai*, the Court found that “[a]ll that the printed matter [did was to] teach a new use for an existing product.” 367 F.3d 1336, 1339 (Fed. Cir. 2004). In that case, the Court found that “the printed matter in no way depends on the kit, and the kit does not depend on the printed matter.” *Id.* Similarly, in this case, the printed matter teaches a new use for an existing product. Thus, we conclude that the evidence supports the Examiner’s position that the instructions are not functionally related to the product (Ans. 6–7).

With regard to claim 8, Appellants additionally argue: “[T]he recitation of surfactant, even at . . . less than 10%, clearly requires that there be some surfactant present. The ‘less than’ limitation does not include ‘none’.” (App. Br. 5.) We are not persuaded.

Claim 8 recites that the product contains “less than about 10% surfactant” (*id.* at 10). Giving this limitation its broadest reasonable interpretation, we agree with the Examiner that it reads on a composition that does not contain any surfactant (Ans. 4 & 20).

#### *Conclusion*

The evidence supports the Examiner’s conclusion that Hink anticipates claims 1 and 8. We therefore affirm the anticipation rejection of claims 1 and 8. Claims 2, 3, 6, and 21 have not been argued separately and therefore fall with claim 1. 37 C.F.R. § 41.37(c)(1)(iv).

#### OBVIOUSNESS

In rejecting claim 4, the Examiner relies on Hink as discussed above (Ans. 9). The Examiner notes that “Hink teaches linalool compositions formulated as a ‘shampoo’ containing 20 - 70% by weight of a surfactant

and a linalool composition formulation as a pump spray which does not appear to contain any surfactant” (*id.* at 9–10). “As such, [the Examiner finds that] the amount of surfactant in the ‘shampoo’ and ‘pump spray’ compositions of Hink fall outside the % surfactant range of from about 1% to about 10% surfactant recited in amended Claim 4” (*id.* at 10).

However, the Examiner finds that “Hink also teaches . . . animal linalool compositions formulated as ‘dips’” (*id.*). In particular, the Examiner finds that “Hink teaches the preferred concentration of linalool in dips is 1 - 4% and can be combined with an inert vehicle or carrier including conventional vehicles, surfactants, stabilizer, perfumes and the like” (*id.*). The Examiner also finds that “Hink teaches the dip composition is preferably provided as a concentrate consisting essentially of linalool in an amount of at least about 10 percent by weight with at least about 10 percent surfactant, preferably from about 10 percent to about 90 percent each of linalool and a surfactant” (*id.*). In addition, the Examiner finds that “Hink teaches dilution of the concentrate should achieve a final linalool concentration of about 0.1 percent to about 2.5 percent, preferably from about 0.3 percent to about 1.5 percent,” which “overlaps with and thus renders obvious the range (0.5 to 5%) recited in instant Claim 4” (*id.*). The Examiner also finds that “Hink does not explicitly teach the amount of surfactant in the diluted dip compositions,” but that, “because Hink teaches the % linalool and surfactant [can be] the same in the concentrate prior to dilution, the resulting % of surfactant . . . encompasses the same range as the % linalool, which would overlap with and thus render obvious the instantly claimed range of about 1% to about 10%” (*id.* at 11).



In addition, the Examiner finds “that Hink’s teaching of a ‘dip’ composition clearly requires that the composition the animal is being ‘dipped’ into is ‘contained’ and thus is ‘in a container’” (*id.*).

*Analysis*

Upon review of the Final Rejection and Examiner’s Answer, we conclude that the Examiner has set forth a prima facie case, which is summarized above, that Hink suggests the product of claim 4.

Appellants argue:

The definition of “container” found by applicants is “**con·tain·er** - object used to hold something: an object such as a box, jar, or bottle that is used to hold something, especially when it is being stored or transported” (emphasis added). The normal meaning should be used unless there is some reason other than finding a basis for rejection. The container of Hink[] et al. would not be suitable for storing the product for storage or transport.

(App. Br. 7.) We are not persuaded.

“[D]uring examination proceedings, claims are given their broadest reasonable interpretation consistent with the specification.” *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000). Appellants’ definition of “container” broadly defines the term as an “object used to hold something” (App. Br. 7). We understand that the definition exemplifies a box, a jar, and a bottle and states that “especially” it “is used to hold something . . . when it is being stored or transported” (*id.*). However, Appellants have not pointed us to anything in the Specification that requires such a narrow interpretation of the term. Therefore, we are broadly interpreting the term as an “object used to hold something” (*id.*). Given this interpretation, we agree with the Examiner “that Hink’s teaching of a ‘dip’ composition clearly requires that the

composition the animal is being ‘dipped’ into is ‘contained’ and thus is ‘in a container’” (Ans. 11).

Appellants also argue that “the dip is not a ‘skin conditioning product’” (App. Br. 7). However, we are not persuaded by this argument at least because claim 4 recites that “the product is a shampoo” and therefore does not require that the product be a “skin conditioning product” (*id.* at 10).

#### *Conclusion*

The evidence supports the Examiner’s conclusion that Hink suggests the product of claim 4. We therefore affirm the obviousness rejection of claim 4.

#### SUMMARY

We affirm the anticipation rejection of claims 1–3, 6, 8, and 21 and the obviousness rejection of claim 4.

#### TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

#### AFFIRMED